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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PMI PETROLEUM MARKETERS, INC., and JAMES J. PECK,

Petitioners,

vs.

GETTY PETROLEUM CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages in the amount of $200,000. against Peck was so excessive in light of Peck's insolvency, and other circumstances, as to violate Peck's due process and equal protection rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. If PMI's behavior amounting to a knowing and intentional violation of Getty's trademark rights does not warrant an award of punitive damages against PMI, how can the same behavior by Peck, PMI's President, justify an award of punitive damages against him at a time when he is insolvent, without violating Peck's right to the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States?

3. Whether the jury should have been permitted to fix lost profits totaling $239,997.40 when the only proof offered of actual lost profits caused by Defendants as contributory infringers totaled $1,515.38 and whether in fact, this was a punitive award in the guise of compensatory damages?

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The Order amd Judgment of the United States Court of Appeals for the Second Circuit is unreported, and is printed in the Appendix hereto, infra, page A-1. The Judgment of the United States District Court, Eastern District of New York entered on February 24, 1989, is printed in the Appendix hereto, infra, page A-6.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 16, 1989. The Jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254.

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STATEMENT OF THE CASE

This appeal in a trademark infringement case concerns the propriety of compensatory and punitive damages awarded by a jury upon special verdicts. The underlying action was commenced by Getty Petroleum Corp. (Getty) in the United States District Court for the Eastern District of New York against Petroleum Marketers, Inc. (PMI), James J. Peck (Peck), and other defendants (retail station dealers who settled with Getty prior to trial without payment of damages, and without implicating Peck and PMI). Only PMI and Peck are appealing. The Complaint alleged infringement of federally registered trademarks, false designations of origin in violation of the Lanham Trademark Act of 1946 [15 U.S.C. Secs. 1051 et. seq. 1114(1) 1116-1118 and 1125 (a)]; common law

violations of trademark and trade name rights; dilution of plaintiff's trademark in violation of New York State General Business Law, Article 24, Sec. 368 et. seq.; and for false advertising in violation of New York State General Business Law Secs. 350 and 350-d. Jurisdiction was based on 28 U.S.C. 1338 (b), 15 U.S.C. 1125 (a) and 1126, and pendent jurisdiction over the state claims.

The District Court, Mishler, J. heard the case before a jury which returned a special verdict awarding allegedly compensatory damages totaling $239,997.40 against PMI and Peck, and a second special verdict awarding punitive damages against Peck only, in the amount of $200,000. Judgment with interest thereon, and also providing for injunctive relief was entered on February 24, 1989.

PMI and Peck contend that the awards of

compensatory and punitive damages are not linked to or supported by the evidence and that the compensatory award is in fact punitive. Peck contends that the punitive award is totally inappropriate in light of his insolvency, and the award of punitive damages violates Peck's rights to due process of law and the equal protection of the laws under the Fifth and Fourteenth Amendments of the Constitution to the United States.

This action arises from the alleged sale and delivery of non-Getty brand gasoline to several Getty service stations by Defendants as contributory infringers of the Getty trademark between February 1, 1985, when the stations were acquired by Getty, and September 1986. The stations were located in New York in the towns of Peekskill, Ossining, Mohegan Lake and Poughkeepsie.

Significantly, Getty previously owned three of the four subject stations as Power Test stations, and despite the existence of sales records dating prior to 1985, no analysis of such records was undertaken or presented to the court beyond a review of the gallonage at each station.

Getty was unable to establish that PMI was delivering to Getty Stations during the entire period from February, 1985 to September, 1986. Getty could not establish but assumed (A-30, 31) that all non-Getty gasoline came from PMI, and acknowledged the existence of other sources of supply (A-21-23). Peck denied selling to Getty. Although Getty claimed damages beginning in February, 1985 it had no evidence to support such a claim:

> Q: All right. Now, at any time in your communication with Mr. Del Gadio, your work at the corporation with regard to this station, did you

look for or find or become aware of any evidence relating to a sale by PMI or a delivery by PMI to Mr. Ogunc's stations in February of 1985?

A: I am not aware of any.

....

Q. So in 1985 alone you have attempted to set forth damages against my client for eleven months in which you have no evidence whatever of a single delivery during that calendar year to this station [Peekskill], is that correct?

A. Yes, I don't have any evidence

(A-28-29). Testimony of Getty Vice-President H. Wechsler.

Among the deficiencies in the proof offered by Getty were the following:

1. No actual pump readings were taken at the three stations run by an independent operator (A-19, 20).

2. Getty had no information or reports of the sale of unbranded gas to Getty dealers between February,

1985 and September, 1986, when it received an anonymous letter (A-24, 25).

3. Getty did not use other records and information which it itself possessed in order to prove its lost profits.

4. Differences in meter readings of tank capacity and stick readings were never reconciled or investigated (A-26,-27).

5. Despite a comparative shortage of 100,000 gallons sold by one station in a two-month period over the prior year's sales, Getty took no action to investigate;

6. Getty never determined if the meters at the station were ever tested, repaired, changed or otherwise maintained (A-30).

These facts were submitted to the jury, which, having found PMI and Peck liable as contributory infringers in a special verdict (A-12-17), awarded damages to Getty as and for lost profits from three of the four stations in the combined amount of $239,997.40.

On the issue of punitive damages, Peck testified that PMI was defunct; that its real estate holdings had been foreclosed upon or transferred to settle certain litigation (A-46-70) a one million dollar judgment has been filed against PMI which has ceased operations and has had its assets restrained (A-56-7). Personally, Peck lives at home with his wife and daughter, in a house which he owns and is heavily mortgaged (A-61, 69). He left PMI in the summer of 1988 and took a job pumping gas for several months (A-66). He has survived on loans

from family and friends (A-67). He is also facing an IRS assessment of approximately $500,000.00 plus interest (A-62, 63, 70)

On this testimony, the jury found that Peck and PMI each acted in the same manner (A-12-17), but awarded punitive damages only against Peck (A-18) in the amount of $200,000.00.

REASONS FOR GRANTING WRIT

A. THE AWARD OF PUNITIVE DAMAGES VIOLATES CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION

The issues in this case arise from the award of punitive damages in a manner which implicates constitutional guarantees against the taking of property, as well as the role of the Court in ensuring due process of law to all litigants. Here, the spectre of a denial of equal protection of the laws is raised where the jury determined that PMI and Peck acted in the same fashion, but awarded punitive damages against Peck only, after awarding compensatory damages in excess of two hundred times the loss actually proven. These matters have remained unanswered or left open in prior decisions of the Court. Browning-Ferris Industries of Vermont, Inc., v. Kelco

Disposal, Inc. 109 S. Ct. 2909 (1989), Bankers Life and Casualty Co. v. Crenshaw 486 U.S. 71 (1988), Texaco, Inc. v. Pennzoil Co. 481 U.S. 1 (1987), Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1985). Their recurring nature combined with the varied manner in which they arise require that the issues be resolved by this Court, as they clearly constitute "special and important reasons" of national concern. Sup. Ct. Rule 17 (1980) In addition, the method by which lost profits are established in trademark infringement cases should be reevaluated where a plaintiff fails to produce proof within its possession and control.

Renewed scrutiny of punitive damages is required when the following issues challenge the very foundations on which punitive damages are awarded:

1. There are no clearly defined standards defining conduct and culpability which may give rise to punitive damages. Vague terms such as "callous disregard" are not defined until the jury acts; by then it is too late.

2. Beyond the finding of culpability, there are no standards to determine whether punitive damages should be awarded, or how the discretion of the jury should be exercised. Here the jury found both Petitioners equally culpable, but awarded punitive damages against Peck only.

3. There are no guidelines to determine the appropriate amount of punitive damages. Similar actions can result in vastly different

damage awards, regardless of any relationship to the harm caused and amount of award. Often the only difference that can account for such awards is the composition of the jury.

4. Appellate review is often limited to the "excessive" nature of such awards with all the subjectivity that the term entails. Here, the testimony revealed that Peck was insolvent, unemployed, and facing IRS assessments of approximately $500,000.00. Under these circumstances, a punitive damage award should be considered excessive.

5. The penal/punitive nature of such awards requires a more exacting burden of proof than that of the

> mere "preponderance of the evidence" used here. This is especially true where such awards could exceed maximum fines statutorily imposed in criminal or administrative proceedings.

Judicial intervention is required when awards of punitive damages no longer serve the purposes of punishment and deterrence, but instead amount to a taking of property by means of economic destruction of livelihoods and businesses. Such a taking imposes an obligation to ensure that the elements of due process are met. If the elements are not met, the Court becomes the institutional structure which sanctions an improper taking. In this context, due process of law requires inquiry beyond the question of the excessive nature of a given award, or the proportion of the award to

compensatory damages. Without standards to guide the discretion of the jury no limits exist on the reasons, passions, or prejudices that may influence the determination of each individual juror. Here, only one of two defendants was subjected to a punitive damage award for the same behavior. One cannot doubt that the attack on Peck through testimony regarding his tax evasion charges was the source of the punitive damage award against him, as in other respects the testimony did not distinguish between Peck and PMI, and as the award indicates, the jury ignored the testimony of Peck's insolvency. Without objective criteria to guide the jury, a defendant facing a claim for punitive damages might be reluctant to litigate, regardless of the quality of the defense, rather than run the risk of unpredictable

financial ruin. The potential chilling effect is very real not only to individuals but also to a business or corporate entity on whose continued existence many individuals may depend. In short, no societal interest is served when the goals of punishment and deterrence are met by what amounts to execution.

After the award of lost profits as Getty's damages, the jury also determined that PMI and Peck were each liable for punitive damages, each having acted with a "callous disregard" for Getty's trademark rights (A-35, 43). The punitive damages were sought pursuant to Getty's state law claims of unfair competition, false advertising, and dilution of trademarks, which were submitted to the jury. Testimony was taken on the issue of punitive damages and the only witness who testified was Peck.

Getty's counsel examined him on the basis of a 1986 financial statement. He was cross-examined about his current financial position, and testified that he was not solvent (A-63), and could not pay the compensatory damages awarded, let alone punitive damages (A-70) above his tax liabilities which are a matter of record. Nevertheless, the jury assessed punitive damages in the amount of $200,000.00 against Mr. Peck only (A-18). No punitive damages were assessed against PMI.

The trial court properly gave a curative instruction advising counsel and the jury to focus on Mr. Peck's current financial condition (A-54). However, this instruction came after Mr. Peck was questioned about collateral matters such as his failure to report income between 1981 and 1983, and the entirely inappropriate suggestion that such

income had been received from gasoline station operators. The vitality of these suggestive questions becomes clear when the jury assesses punitive damages against him at a time when he is insolvent. The only inference that Getty sought to draw was that Peck had assets which derived from ill-gotten gains and that punitive damages were proper to reach those assets.

Peck was examined on the basis of a 1986 financial affidavit, which included corporate assets of PMI, Peck's personal assets, and marital assets (A-46, 49). As of February, 1989, the assets listed on the financial statement were subjected to the following:

a. A judgment in excess of one million dollars against five pieces of real estate owned by PMI (A-57, 58)

b. Foreclosure of a blanket mortgage against three of those properties (A-57).

c. The transfer of another parcel of real property in settlement of a lawsuit (A-58, 59).

d. The Poughkeepsie station was partially condemned by eminent domain, and the balance was later sold by PMI, with the proceeds going into the business (A-59, 60).

e. PMI no longer has any assets, has ceased operations, and has been subjected to restraining orders (A-64 65).

Mr. Peck has not fared any better than PMI. His personal misfortunes include:

a. He was awaiting sentencing on two counts of tax evasion (A-62).

b. He is subject to civil assessments by the Internal Revenue

Service in excess of $500,000.00 (A-62).

c. He is also subject to criminal and financial penalties (A-63).

d. He took out a $300,000.00 mortgage on his residence, where he lives with his wife and daughter, to try to salvage his business (A-61, 69).

e. He was last employed operating a service station and pumping gas prior to the Christmas holidays in 1988 (A-66).

Against this background, the assessment of punitive damages is incomprehensible. The United States Court of Appeals for the Second Circuit recently stated that a jury, considering the issue of punitive damages,

> should proceed with calm discretion and sound reason to determine the amount of such an award, and that punitive damages should be fixed in

> an amount that would warn the defendant and others not to engage in similar conduct, but that the amount assessed should not be so high as to result in financial ruin to the defendant so assessed,

Smith v. Lightning Bolt Productions, 861 F.2d 363, 373 (2d Cir. 1988) (emphasis added). The Second Circuit ruling here is clearly inconsistent with Smith, supra. Here, the financial ruin added to Peck's other misfortunes cannot be ignored. Counsel promptly moved to set the award aside, but to no avail (A-73). In denying that motion, the court looked only at "the ratio of punitive damages to compensatory damages" (A-73). Although the court was "inclined to believe the testimony and Mr. Peck's present situation (A-72); the court did not consider its own instructions that such awards should not be "excessive", nor "be in such amount that would cause

financial ruin to a defendant" (A-71). Smith, supra. Under the circumstances, here the award of punitive damages must "shock the judicial conscience." Zarcone v. Perry 572 F. 2d 52, 56 (2d Cir. 1978).

Smith v. Lightning Bolt, supra, provides a significant counterpoint to these issues. In Smith, on remittitur the punitive damages were reduced to $500,000.00 by the District Court against both defendants jointly. The Court of Appeals, on review, further reduced the punitive damage award where "the record suggests that a punitive damage award of $500,000..... constitutes a disproportionately large percentage of its net worth" 861. F. 2d at 373, and that even an award of $187,500 "may be excessive in light of its financial condition." Id. 374, but that "an award against" Lightning Bolt of no more than $100,000. should suffice,

consistent with what has been revealed as to its financial condition, to serve the goals of such an award." Id. 374-375. This emphasis on the party's financial condition should apply with equal force here. It has been demonstrated without dispute that Peck faces substantial tax liabilities, is not solvent, and is unable to pay the compensatory damages awarded here (A-70, 72). The only asset he still possesses is a marital residence, which is heavily encumbered (A-61, 69) and is the only asset against which Getty has sought to enforce the Judgment. Peck no longer has a net worth against which a punitive damage award can be assessed; thus, a $200,000. award would be disproportionately large. The goals of punishment and deterrence would not be affected by vacating the award of punitive damages against Peck. Those goals

are only met when they are applied against a litigant with something to lose. Peck cannot be punished any more as financial ruin already exists, with IRS liabilities still outstanding. The value of a deterrent factor is limited by Peck's financial condition. In short, no established social or legal interests would be served by awarding punitive damages here.

The jury concluded, in their special verdicts, that Peck and PMI each acted with the same degree of moral culpability as the other. Each party, as Peck testified was suffering from legal and financial misfortune. PMI was no longer functioning or generating revenue; its assets were restrained. Peck's fortunes had fallen from owning a company operating 35 - 40 stations to a point where he could not successfully pump gas at one station. While

these parties appear to stand on equal footing, the disparate treatment accorded them by the jury must "shock the judicial conscience and constitute a denial of justice." Zarcone, 572 F. 2d at 56. This is especially true where the jury verdicts did not show any difference in behavior or treatment between the two. Put another way, if PMI's behavior amounting to a knowing, and intentional violation of Getty's trademark rights performed with a callous regard for such rights does not warrant an award of damages against PMI, how can the same behavior by Peck justify an award of damages? It cannot, and it is clear that the purposes of punishment and deterrence are not met - they are violated or mocked by such disparity in treatment. Such treatment is the antithesis of equal protection.

The award of punitive damages against

Peck violates the provisions of the Fifth and Fourteenth Amendments. U. S. Const. amends. V, and XIV. The regular course of a judicial proceeding is premised on fundamental notions of justice and fair play, which give rise to rules, principles, and standards designed to protect and vindicate private rights. Litigants, through counsel, may force a clash of those principles and rules in their respective quests for protection and enforcement of their rights. Most significantly, a court is sitting, not only as an arbiter of conflicting claims, but also as an institutional or societal interest, ensuring fairness to those who come before it. In this structure, jurors are given great latitude, but not absolute freedom. Due process requires that jurors resolve disputes based on legally fixed standards,

and their impartial stature requires that they act only on the evidence adduced before them. The judicial role requires, in part, occasional action as a check or limit on the unbridled discretion of a jury. Such a role must be exercised here in favor of a litigant whose insolvency has not been seriously questioned, and who stands on the brink of financial ruin.

Implicit in legal mechanisms such as remittitur, additur, or trebling of damages is the power of the court to control awards based on the facts of each case. These devices may be employed for a variety of reasons, such as statutory authority juror confusion concerning the applicable law, or the passion or prejudice of a jury. The need for such control applies to punitive damage awards, as Judge Friendly observed thirteen years ago:

> The writer, speaking for himself alone believes that the trend toward extremely large punitive damage awards may require trial and even appellate courts to subject such awards to more exacting scrutiny than awards of compensatory damages.

Morrisey v. National Maritime Union of America, 544 F. 2d 19, 34 (2d Cir. 1976). This Court, in holding that a punitive damage award does not violate the Eighth Amendment's prohibition against excessive fines, left open the question of "whether due process acts as a check on undue jury discretion to award punitive damages." Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909, (1989). The due process clause, it is submitted, not only acts as such a check, but also, it requires such action.

Here, the jury was given the following initial instruction with respect to punitive damages:

> Now we come to the last question. The last question asks you to determine whether the acts of each contributory infringer were done knowingly, intentionally and with a callous disregard for Getty's trademark rights. That question goes beyond the issue you find in the other question as to whether the defendants had knowledge as to the delivery of non-Getty gasoline to Getty stations.
>
> For if the acts of contributory infringement were done willfully, deliberately, and more importantly, with a callous disregard and a reckless indifference to the trademark rights of Getty, then you will answer the question yes.
>
> If you find that Getty failed to prove by a preponderance of the evidence that the act or infringement were not done with a callous disregard of Getty's trademark rights and with a total indifference to Getty's rights, which means a lack of sensitivity to Getty's trademark rights, that the Plaintiff has not proved that, then you will find the answer is no.

(A-35, 36). Unfortunately, terms such as "knowingly", "intentionally", "callous disregard", "willfully", "deliberately",

"reckless indifference", and "lack of sensitivity" were not defined for the jury. Without any standards or definitional guidance, it is not surprising that the jury requested a definition of "callous disregard" (A-37). That request led to a colloquy between Judge Mishler and counsel (A-37-43). PMI and Peck, through counsel, sought to include an element of recklessness in the definition (A-40-42), but the court rejected it, and exception was taken (A-43-45). The Court then defined "callous disregard" as follows:

> A callous disregard of the rights of the trademark owner means performing the acts of infringement without thinking of the trademark owner's rights and being insensitive of the trademark owner's rights to the point of indifference.

(A-43) Ten minutes later, the jury returned its verdict, awarding compensatory and punitive damages (A-12-17, 18, 46).

The trial court erred in failing to include the element of reckless conduct in the definition of callous disregard, which it charged the jury. Roginsky v. Richardson - Merrell, Inc., 378, F. 2d 832, 843 reh. den 378 F. 2d 851 (2d Cir. 1967). This omission left the jury free to consider the behavior of PMI and Peck without an adequate standard. The holding in Roginsky is in direct conflict with the Second Circuit decision here. This conflict illustrates the confusion in the Circuit Court which needs to be resolved by this Court. The "insensitivity" and "indifference" contained in the court's definition failed to provide the guidance needed to establish the awareness and conscious disregard of Getty's rights as a prerequisite to the award of punitive damage. In the absence of such a definition, the jury had no demarcation

point between compensatory and punitive damages. This erroneous charge left the jury free to award $200,000.00 in punitive damages against an insolvent individual who is facing tax liabilities in excess of $500,000.00 (A-62). Due process requires corrective measures.

The passion and prejudice of the jury is evident in its refusal to award punitive damages against PMI, a now defunct corporation and its willingness to burden Peck with such damages and its award of compensatory damages far in excess of that established. The award of damages occurred after Getty's counsel again elicited testimony concerning Peck's plea to income tax evasion (A-50-52), despite additional testimony as to Peck's current financial condition. This passion led the jury to ignore the role of PMI employees in the

infringement process for the benefit of PMI. Brenda Binney, Peck's former secretary, supported Peck's denial of sales to Getty Stations (A-32-33). Certainly, if PMI's Vice-President was accepting orders for gasoline, and had the authority to accept a new station, or set credit terms, the opportunity for such conduct existed (A-32-33), especially when other employees reported to, or took orders from PMI's Vice-President. The Vice-President of PMI, not only was fully cognizant of the daily activities in the front office, but also he was in the unique position to approve, ratify, - or prevent - these activities. Doralee Estates, Inc. v. Cities Service Oil Co., 569 F. 2d 716 (2d Cir. 1977); Walker v. Sheldon 10, N.Y. 2d 401, 404-405 (1961). Under these circumstances, punitive damages if any, should have been awarded against

PMI, not Peck. Loughry v. Lincoln First Bank, N.A., 67 N.Y. 2d 369, 375 - 78 (1986), O'Donnell v. K-Mart Corp., 100 A. D. 2d 488, 492 (4th Dept. 1984). Brenda Binney's testimony that Peck never sanctioned, authorized, approved or acted in any way in connection with a sale to a Getty station (A-32-3), and other testimony led the court to conclude that PMI and Peck should be treated as separate entities:

> From the examination I am convinced that the Defendant PMI and PECK are to be considered separate. There is no question in my mind about that. I can see where the defense of MR. PECK is that it may have gone on but he knew nothing about it so he didn't participate in any way.

(A-34). Nevertheless, the jury found that PMI and Peck acted with the same callous disregard for Getty's trademark rights, but in effect, held Peck personally accountable for the actions of the corporate employees,

by its award of punitive damages.

Judicial intervention is necessary in order to ensure Peck's due process rights. The need for this correction stems as much from Peck's insolvency as it does from the disparate treatment accorded PMI and Peck. Fundamental fairness, as a cornerstone of our judicial system requires due process mechanisms to limit the jury's award, especially where the result is financial ruin or unfairness, through the application of standardless punitive awards. Roginsky, supra. That fairness can be accomplished by controlling the unbridled discretion of the jury.

B. LOST PROFITS AS COMPENSATORY DAMAGES WERE IMPROPERLY ESTABLISHED

This Court should re-examine the methods by which lost profits are established in trade regulation cases where a plaintiff

relies on a defendant's alleged non-production of evidence, but fails to produce evidence within its own possession and control. Here, Getty established two deliveries of gasoline, which PMI and Peck admitted, but denied the massive scheme alleged by Getty and Petitioners produced nearly one thousand documents to disprove Getty's claims. Nevertheless, Getty asserted the non-production of documents as a bases for drawing of negative inferences and the award of damages based on weak and speculative proof. The long established rule, which permits recovery where the fact of damage has been established although the amount of damage has not, as set forth in Story Parchment Co. v. Patterson Parchment Paper Co. 282 U.S. 555 (1931), fails to recognize that methods of proof exist today which did not exist sixty years ago, and

before speculative proof is permitted, a greater reliance on concrete proof should be required. That requirement would have forced Getty to come forward with records in its custody and control as to prior sales, pump readings at each station, comparative shortages over various time periods, and other records and information which Getty possessed. It is submitted that Getty's own non-production of information served as a vehicle to inflate its claims.

Significantly, the inferring of sales as a basis upon which damages are awarded under the Lanham Act, 15 U.S.C. 1117 (1975), has produced a division of authority in at least two Circuit Courts of Appeals. The Ninth Circuit refused to award full damages despite a motive to extract punishment:

> ...while we readily acknowledge that the defendants were guilty of willful trademark infringement, abuse of the discovery process and

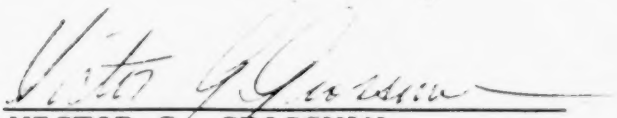
> generally evasive and noncooperative behavior, we do not believe that it would be appropriate to award PEI an equity based on accounting of profits premised on potentially fictitious sales from which the defendants derived no economic gain.

Playboy Enterprises, Inc., v. Baccarat Clothing Co., Inc. 692 F. 2d 1272 (9 Cir. 1982). (emphasis added). Proof was required of actual sales, as the Court refused to infer additional sales from the number of labels ordered, or speculate as to any additional sales. The Second Circuit has relied on the position it set forth thirty years ago in Deering Milliken & Co., Inc. v. Gilbert 269 F. 2d 191 (2d Cir. 1959), where the Court permitted the Plaintiff to estimate its damages resulting from what was characterized as a "criminal scheme calculated to trade upon the Milliken trademark." id. at 192 by inferring sales from the counterfeit hand tags delivered to

the defendant with the Milliken trademark. The division of authority requires a resolution by this Court, in order to promote a uniform interpretation of the law as it applies to establishing damages.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.



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APPENDIX

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At the stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of October, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE IRVING R. KAUFMAN

HONORABLE WILFRED FEINBERG

HONORABLE RICHARD J. CARDAMONE

Circuit Judges

----------X

GETTY PETROLEUM CORP.,

Plaintiff-Appellee,

- against -

PMI PETROLEUM MARKETERS, INC.,

JAMES J. PECK,

Defendants-Appellants.

----------X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court is AFFIRMED.

1. Defendants PMI Petroleum Marketers, Inc. and James J. Peck appeal from a

judgment of the United States District Court for the Eastern District of New York, Jacob Mishler, J., after a jury verdict, against PMI and Peck. Plaintiff-Appellee Getty Petroleum Corp. discovered that appellants were selling gasoline to Getty's franchised gasoline stations. (The stations were bound by franchise agreement to use only Getty's gasoline). Getty sued appellants, alleging, among other things, trademark infringement. The jury found that appellants were knowing and intentional contributory infringers of Getty's trademark, and assessed $239.997.40 in compensatory damages against both appellants, and $200,000 in punitive damages against Peck only.

2. Appellants argue that the proof of lost profits was insufficient to justify the compensatory damage award. Viewing the evidence in the light most favorable to

Getty, and giving it the benefit of all inferences which the evidence fairly supports, we do not agree. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). Appellants chose not to present the jury with an alternative calculation of damages. Where a defendant refuses to come forward with evidence, a plaintiff need simply give some basis for a reasoned conclusion as to the extent of the injury. Deering, Milliken & Co. v. Gilbert, 269 F. 2d 191, 193 (2d Cir. 1959). See also Brink's, Inc. v. City of New York 717 F. 2d 700, 712)(2d Cir. 1983)(wrongdoer cannot avoid liability because plaintiff is unable to demonstrate the extent of injury with precision). Appellee gave such a basis, including meter readings and photographs of surreptitious deliveries of gasoline.

3. Peck argues that the award of punitive damages was excessive. We are not

persuaded. The jury evidently did not believe that Peck was telling the truth that he was insolvent. Cf. Zarcone v. Perry, 572 F. 2d 52, 56 (2d Cir. 1978) (defendant bears the burden of showing his modest means). And the punitive damage award was not so large as to "shock the judicial conscience." Id. Indeed, the jury assessed Peck less in punitive damages than in compensatory damages.

4. We have reviewed all of appellants' arguments, and they are without merit.

5. The judgment of the district court is affirmed.

S/
IRVING R. KAUFMAN

S/
WILFRED FEINBERG

S/
RICHARD J. CARDAMONE

Circuit Judges

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

GETTY PETROLEUM CORP.,

Plaintiff,

JUDGMENT

-against-

PMI PETROLEUM MARKETERS, INC.,
JAMES J. PECK,
SHAMS UL HAQUE,
YALKO SERVICE STATIONS, INC.,
IKRAM SERVICE STATION, INC., and
FERHUN OGUNC, Individually and
d/b/a KAAM SERVICE STATION,

Defendants.
----------X

This action having been brought by the plaintiff for infringement of a United States registered trademark and service mark and for other relief, plaintiff's claim against the defendant Ferhun Ogunc and Kaan Service Station having been settled by stipulation and the consent of the defendant Ferhun Ogunc and Kaan Service Station dated January 9, 1989 and so ordered by this court on February 3, 1989, to a permanent injunction containing the same provisions as

the permanent injunction issued by this court on January 8, 1987, as well as additional provisions incorporated in said stipulation; plaintiff's claims against Shams Ul Haque, Yalko Service Station, Inc. and Ikram Service Station, Inc. having been settled by stipulation, dated September 30, 1986, and the consents by those defendants to a permanent injunction which was issued by this court on October 10, 1986; and this action having come on for trial before the court and a jury, Honorable Jacob Mishler, District Judge, presiding on the issues of liability, compensatory damages and punitive damages and the jury having rendered its verdict on February 10, 1989.

IT IS ORDERED AND ADJUDGED

That the plaintiff Getty Petroleum Corp. recover of the defendants, Petroleum Marketers, Inc. and James J. Peck, the sum of $150,003.00 as and for lost profits for

the period February 1, 1985 to September 22, 1986 at the Peekskill station, with interest thereon at the rate of 9% from September 22, 1986 in the amount of $32,475.06 for a total of $182,478.06;

That the plaintiff Getty Petroleum Corp. recover of defendants PMI Petroleum Marketers, Inc. and James J. Peck the sum of $44,997.20 as and for lost profits for the period from February 1985 to September 22, 1986 at the Ossining station, with interest thereon at the rate of 9% from September 22, 1986 in the amount of $9,742.30 for a total sum of $54,739.50;

That the plaintiff Getty Petroleum Corp. recover of the defendants, PMI Petroleum Marketers, Inc. and James J. Peck the sum of $44,997.20 as and for lost profits for the period from February 1, 1985 to September 22, 1986 at the Mohegan Lake station, with interest thereon at the rate of 9% from

September 22, 1986 in the amount of $9,742.30 for a total sum of $54,739.50;

That the plaintiff Getty Petroleum Corp. recover of the defendant James J. Peck the sum of $200,000.00 as and for punitive damages, with interest thereon at the rate of 9% per annum from February 10, 1989 in the sum of $345.24 for a total sum of $200, 345.24; and

That the bond filed by Getty Petroleum Corp. in connection with the issuance of the preliminary injunction in this action is hereby discharged.

IT IS ORDERED AND ADJUDGED

That PMI Petroleum Marketers, Inc., James J. Peck, their agents, servants, employees, attorneys and all persons in active concert or participation with them are hereby restrained and enjoined from in any manner, directly or indirectly, transporting, delivering or selling any

gasoline, motor fuel or petroleum products to any retail gasoline station bearing the mark and designation Getty, or in any manner, directly or indirectly using the mark Getty or any word or words similar to Getty as or as part of any trademark, service mark, brand name, trade name, or any business or commerical designation, in connection with the selling, offering for sale, distribution, transportation, advertising or promotion of gasoline or other petroleum products or otherwise;

That the permanent injunction issued on October 10, 1986 by the Honorable Jacob Mishler in favor of Getty Petroleum Corp. and against Shams Ul Haque, Yalko Service Station, Inc. and Ikram Service Station, Inc. is hereby continued;

That the permanent injunction issued on January 8, 1987 by the Honorable Jacob Mishler in favor of Getty Petroleum Corp.

and against Ferhun Ogunc and Kaan Service Station is hereby continued and: (i) Ogunc is further enjoined from at any time in the future, directly or indirectly, having any financial or ownership interest in or being employed by or associated with any Getty brand gasoline or any gasoline station in which the brand name is controlled or owned by the plaintiff or its successors and assigns; and (ii) Ogunc is enjoined from ever selling, delivering or causing to be delivered or sold, gasoline to any Getty brand gasoline station or any gasoline station the brand of which is controlled or owned by the plaintiff, its successors or assigns.

Dated: Uniondale, New York
February 17, 1989 at 2:30 p.m.

S/ JACOB MISHLER
UNITED STATES DISTRICT JUDGE

ENTERED
FEBRUARY 24, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
GETTY PETROLEUM CORP.,

CV 86-3126

Plaintiff,

SPECIAL
VERDICT

- against -

PMI PETROLEUM MARKETERS, INC.
and JAMES J. PECK,

Defendants.
----------X

Getty Petroleum Corp. (Getty) has the burden of proving the affirmative (yes) by a preponderance of the evidence.

I. Peekskill Station

1. During the period February 1, 1985 to September 22, 1986, did the operator of the station infringe the Getty trademark by selling non-Getty gasoline as Getty gasoline?

Yes XX No_____

[If the answer is NO do not answer Questions 2 or 3].

2.(a) Was PMI a contributory infringer?

Yes XX No _____

2.(b) Was Peck a contributory infringer?

Yes XX No _____

[If the answer is NO to both 2(a) and 2(b), do not answer Question 3].

3. The lost profits to Getty as a result of PMI's or Peck's participation is $150,003.00.

II. Ossining Station

4. During the period February 1, 1985 to September 22, 1986, did the operator of the station infringes the Getty trademark by selling non-Getty gasoline as Getty gasoline?

Yes XX No _____

[If the answer is NO do not answer Questions 5 and 6].

5(a) Was PMI a contributory infringer?

Yes XX No _____

5(b) Was Peck a contributory infringer?

Yes XX No _____

[If the answer is NO to both 5(a) and 5(b) do not answer question 6}.

6. The lost profit to Getty as a result of PMI's or Peck's participation is $44,997.20.

III. Mohegan Lake Station

7. During the period February 1, 1985 to September 22, 1986, did the operator of the station infringe the Getty trademark by selling non-Getty gasoline as Getty gasoline?

Yes XX No _____

[If the answer is NO do not answer Questions 8 and 9].

8(a) Was PMI a contributory infringer?

Yes XX No _____

8(b) Was Peck a contributory infringer?

Yes XX No _____

[If the answer is NO to both 8(a) and 8(b),

do not answer Question 9].

9. The lost profit to Getty as a result of PMI's or Peck's participation is $44,997.20.

IV Poughkeepsie Station

10. During the period March 1, 1986 to August 22, 1986, did the operator of the station infringe the getty trademark by selling non-Getty gasoline as Getty gasoline?

Yes _____ No XX

[If the answer is NO do not answer Questions 11 and 12].

11(a) Was PMI a contributory infringer?

Yes _____ No_____

11(b) Was Peck a contributory infringer?

Yes_____ No_____

[If the answer is NO to both 11(a) and 11(b) do not answer Question 12].

12. the lost profits to Getty as a result of PMI's or Peck's participation is $_____.

[If the answers to Questions 2, 5, 8 and 11 (referring to PMI and Peck as "contributory infringers") are all answered NO do not answer Question 13].

13(a) Were the acts of PMI as a contributory infringer done knowingly, intentionally and with a callous disregard for Getty's trademark rights?

Yes XX No _____

13(b) Were the acts of Peck as a contributory infringer done knowingly,

intentionally and with a callous disregard for Getty's trademark rights?

Yes XX No _____

Dated: Uniondale, N.Y.
February 10, 1989

S/_____
Foreperson

ENTERED:
FEBRUARY 24, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
GETTY PETROLEUM CORP.,

CV86-3126

Plaintiff,

- against - SPECIAL VERDICT

PMI PETROLEUM MARKETERS, INC.
and JAMES J. PECK, ASSESSMENT OF PUNITIVE DAMAGES

Defendants.
----------X

1. PMI Petroleum Marketers, Inc. is assessed the sum of $-0- as punitive damages.

2. James J. Peck is assessed the sum of $200,000 as punitive damages.

Dated: Uniondale, N.Y.
February 10, 1989

S/
Foreperson

ENTERED:
FEBRUARY 14, 1989

**CROSS-EXAMINATION OF JAMES WECHSLER
VICE-PRESIDENT OF GETTY PETROLEUM CORP.**

Q Now, with regard to pump readings and I would like to return to those for a second, did you have any pump readings for any station other than the one operated by Mr. Ogunc?

A I am not aware of any.

Q I thought you told us that it was the regular course of your business to obtain these pump readings. Did you not?

A I didn't say it was the regular course.

Q Maybe you can explain that, sir.

A The situation in Route 202 Crompound, the company operated the station just prior to Mr. Ogunc taking over and, therefore we had them.

In other situations like Mohegan lake, where we took over a situation from the previous Getty administration we didn't have starting numbers to start with.

Q. I don't understand.

Whether you got the number from the day before, or you took the number on the day you took over, you would still have--

A Under normal circumstances when a station is run by an independent operator we don't go in and take pump readings. It is not necessary. It is his business and he does that.

The reason there were pump readings in the 202 Crompond station is that the company operated the station and, therefore, had them as a matter of their procedure immediately prior to his taking over the, the dealer.

[TRIAL TRANSCRIPT 202-03]

Q And is it also correct to say, Mr. Wechsler, that in your experience there have been stations that for reasons of their own, which may have been price or may have been any other consideration have bought from two or three other sources other than Getty?

A We have station that bought gasoline other than from Getty, yes, sir.

Q And some of those stations bought from two or three different sources over a period of time?

MR. DEL GADIO: Objection. What is the relevancy of that.

THE COURT: Overruled. I will allow it.

A. I am trying to think, counselor of any situation that I am aware of that they had two or three different suppliers. Usually a person who is playing games doesn't want to expose himself to the fact that he can

have three possible avenues of being caught. If he is happy he stays with one which reduces his exposure.

Q Unless, of course, the price induces him to go somewhere else; is that correct?

A Except that these bootleggers are all pretty competitive also.

Q So, when we come right down to it, Mr. Wechsler, even if Mr. Ogunc had sold more gasoline than he received from Getty outside of the fact that you made an assumption that all of that had to be from PMI, you have no evidence of that?

A I have no evidence of that.

TRIAL TRANSCRIPT 218-19.

Is it fair to say, Mr. Wechsler during the period February 1985 until the beginning of September 1986 you received from your marketing representatives, whose duties included visiting the station, any question as to the volume or their purchases?

A I wouldn't have received, but it wouldn't be me that he would contact or give that information to.

Q Would it ultimately be the vice president of retail sales?

A He would get it and I would get it also at that time. But he would go up the chain. He would have his own regional people that he would point to.

Q Fine. And if --

THE COURT: If it were a matter of delivering unbranded Getty gasoline to a Getty station, wouldn't that come to your

attention?

THE WITNESS: Yes, your Honor.

Q And during that period it did not?

A It did not.

TRIAL TRANSCRIPT 228-29

Q Is it not a fact that in that instance the gasoline was measured in three areas, three different types of product, correct?

A Regular, no lead and super no lead, yes, sir.

Q And in every single -- in every single case there was found to be from 500 to 1,000 gallons short?

A There was some inventory shortage based on the stick readings versus the pump readings, yes, sir.

Q They didn't agree?

A Yes.

Q And as you see at the bottom on the manager check list, the gas tanks were measured at 6:00 o'clock in the morning on the day that Mr. Ogunc was to take over, November 1, and were called in to your offices; is that correct?

A Yes, sir.

Q Was any investigation made by your company, agent or servant thereof with regard to those discrepancies?

A No. The reason they were called into the refinery --

Q Just answer my question, please. The answer is no?

A Would you repeat it, please?

Q Yes, Was any investigation made into those discrepancies by your company or any agent or servant thereof?

A I don't know.

Q Well, let me ask it this way, was it ever called to your attention that there were discrepancies between stick readings and totalizer figures before, during or after Mr. Ogunc's tenure?

A No, sir.

TRIAL TRANSCRIPT 251-52

Q Now, at any time in your communication with Mr. Del Gadio, your work at the corporation with regard to this station, did you look for or find or become aware of any evidence relating to a sale by PMI or a delivery by PMI to Mr. Ogunc's stations in February of 1985?

A I am not aware of any.

Q But you are claiming lost profits for both unleaded and leaded -- excuse me, unleaded regular and unleaded premium for the month in which you have no record of any delivery; is that correct?

A Because I take it --

THE COURT: No.

Is that right?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Now, the same exact answer is true and

correct as of March 1985, is it not?

A Yes, sir.

Q April of 1985?

A Yes, sir.

Q May of 1985?

A Yes.

Q Right through the end of that year, correct, sir?

A Yes.

Q So, in 1985 alone you have attempted to set forth damages against my client for 11 months, in which you have no evidence whatever of a single delivery during that calendar year to this station; is that correct?

A Yes, I don't have any evidence.

TRIAL TRANSCRIPT 268-69

Q Mr. Wechsler, one of the assumptions which you made here is that no meter was either changed or repaired; is that correct?

A The assumption was that the meters were operative during the period of time, yes, sir.

Q Would you tell the jury what you did to verify that?

A I didn't get any information with respect to any changes so I assume that there weren't changes.

Q What inquiries did you pursue in that area, sir?

A Just asking the maintenance department. That was it.

Q Did you get a written response from the maintenance department?

A No, sir.

Q Now, another assumption that you made was that if there weren't any non-Getty

delivery -- if there were any non-Getty deliveries to this station it could only be PMI; is that correct?

A Yes, sir.

Q So that's the second assumption you made, correct?

A It is an assumption, yes.

If I can embellish on that answer I would be happy to.

Q It's an assumption, that's the question.

A Yes, sir.

TRIAL TRANSCRIPT 270-71

**TESTIMONY OF BRENDA BINNEY,
SECRETARY TO JAMES J. PECK**

Q Would you please tell the jury in all of the time that you worked for PMI did Mr. Peck to your knowledge ever sanction, authorize, order, direct, approve or act in any other way with a sale to a Getty station?

A No.

MR. DEL GADIO: Objection.

THE COURT: Overruled. I will allow it.

Q Did you ever see, maintain, have or what was the sheet, a ledger -- maintain a ledger of any account that was marked, designated, identified or even known to you to be Getty?

A No.

Q Now, with regard to the way PMI operated, Mrs. Binney, were there large and frequent periods of time when Mr. Peck was not in the office?

A I don't think so.

Q Well, were there periods of time when he was out buying gasoline, large parts of the day?

A Yes.

TRIAL TRANSCRIPT 448-49

Q And with regard to Mr. Del Gadio's question about the final decision to take on a Getty -- to take on a station or not take on a station, first of all, if Mr. Peck was out of the office would Mr. Manzi have had the opportunity to make that decision for the time being?

A Yes.

Q Second of all are you ever aware of an instance in which Mr. Peck ever made a final decision, excuse me, to take on a station which could have been identified in any way as a Getty station?

A No.

TRIAL TRANSCRIPT, 453-54

Binney-redirect/Delgadio

THE COURT:

From the examination I am convinced that the defendant PMI and Peck are to be considered separate. There is no question in my mind about that. I can see where the defense of Mr. Peck is that it may have gone on but he knew nothing about it so he didn't participate in any way.

TRIAL TRANSCRIPT, 463

CHARGE

...Now we come to the last question. The last question asks you to determine whether the acts of each contributory infringer was done knowingly, intentionally and with a callous disregard for Getty's trademark rights. That question goes beyond the issues you find in the other question as to whether the defendants had knowledge as to the delivery of non-Getty gasoline to Getty stations.

For if the acts of contributory infringement were done willfully, deliberately and, more importantly, with a callous disregard and a reckless indifference to the trademark rights of Getty then you will answer the question yes.

If you find that Getty failed to prove

by a preponderance of the evidence that the act or infringement were not done with a callous disregard of Getty's trademark and with a total indifference to Getty's rights which means a lack of sensitivity to Getty's trademark rights, that the plaintiff has not proved that, then you will find the answer is no.

TRIAL TRANSCRIPT, 944-45

(Time noted 2:45 p.m.).

THE COURT: Court Exhibit 6, a definition of callous disregard.

I thought I defined it and apparently it went something further. The dictionary definition says hardened, insensitive. I will take suggestions.

I am willing to say that they must find that the acts were committed without any thought of the rights --

MR. AURNOU: I would suggest, your Honor, that it might be something with a purpose beyond simply an ordinary business purpose to make money.

THE COURT: No.

MR. DEL GADIO: Objection to that.

THE COURT: I am trying to expand the idea and keep within the bounds of what I believe is the correct charge. I am willing to say that callous disregard includes performing any acts without thinking of the

trademark owner's rights, being insensitive and thoughtless and indifferent to the trademark's rights. Something like that.

MR. AURNOU: I would object to that, your Honor, that would be merely indifference. I think callous indifference has to be more than that.

THE COURT: Let me tell you what the definition is that is provided by Devitt & Blackmar. The phrase is wantonly done. An act or failure to act is wantonly done if done in reckless or callous disregard of or indifference to the rights of one or more persons, including the injured person.

I can tell them to include wantonly done, and then I can give the definition of wantonly as in the form.

MR. DEL GADIO: Wantonly introduces another aspect, another definition.

I know where your Honor conceived the idea of --

THE COURT: Mind you, the definition of wantonly done includes the definition of reckless disregard or indifference to, I think wantonly done includes all those factors as well.

MR. DEL GADIO: I accept your initial definition. Once you get into wanton you are getting into another area that may create more confusion in a jurors' mind as to how to define wanton.

THE COURT: That is defined as a reckless and callous disregard. Of course, they want to know what callous disregard is.

MR. DEL GADIO: Then we are right back to callous disregard. I think it is simple to define what you suggested, define callous disregard.

THE COURT: What is your objection to what I just said, Mr. Aurnou? It means performing the acts of infringement without thinking of the trademark rights of the

owner, and I will include -- I will include and being insensitive, being insensitive and indifferent to the trademark owner's rights.

MR. AURNOU: I think it is the difference like we have in criminal law between reckless -- in one instance you are not thinking about it and in the other instance you are conscientiously disregarding. They have to be both thinking about it and to determine wantonly to go out and violate it.

THE COURT: How about if I say it is not enough that they are just negligence, it goes beyond negligence?

MR. AURNOU: It goes beyond not thinking about it.

MR. DEL GADIO: Your Honor, once you have knowing intent, and we discussed this and I briefed this a number of times, where the cases said either intentionally or knowingly or callous disregard. You wanted

to use the phrase and I agree with you. But once you are getting into negligence you are creating more issues before the jury.

THE COURT: I will charge it as follows. Performing the acts of infringement without thinking of the trademark owner's rights, the rights of the owner and being insensitive and thoughtless to the point of indifference to the trademark owner's rights.

MR. DEL GADIO: I accept that.

THE COURT: You tell me specifically what you say is wrong with that.

MR. AURNOU: I am saying in order to be callous they have to be thinking about it and consciously intend to violate or disregard it.

THE COURT: You mean if they are indifferent to it then it is wrong?

MR. AURNOU: No, your Honor. I mean if they are not thinking about it, if their

only motive was to sell gasoline and make a profit and they are not thinking that he has a trademark and so forth, that is not callous indifference. That is an ordinary business motive. To be callous indifference, it has to be a person who appreciates that the mark is there, and says that in order to sell my gasoline I am going to disregard that mark knowing that it is wrong to do so.

THE COURT: You are saying that I should tell this jury that if the defendants were only thinking of profit and weren't thinking of the trademark rights, that it is not in callous disregard?

MR. AURNOU: No, your Honor.

I am saying if they were negligent in not thinking of it then they cannot be in callous disregard: For callous disregard they have to have thought of it, been aware of it, and intended to infringe.

THE COURT: Seek the jury, Martin.

(The jury enters the courtroom at 2:55 p.m.)

THE COURT: You asked me to further define callous disregard.

A callous disregard of the rights of the trademark owner means performing the acts of infringement without thinking of the trademark owner's rights and being insensitive of the trademark owner's rights to the point of indifference. I hope that expanded definition will help you.

The jury is excused for further deliberation on the matter.

MR. AURNOU: May the record reflect that I except to that portion of the charge for the reasons stated.

THE COURT: When I recalled the definition that amounted to indifference to, I was going to say that it amounts to not caring whether you violate the trademark

owner's rights, which is a lot different from your perception of what it means.

MR. AURNOU: Exactly.

THE COURT: That he has to be actually thinking that I am only trying to make a profit and I am not thinking of the owner's rights.

MR. AURNOU: In my view, your Honor, there is a difference. And if they would have said indifference your definition in my view would have been exactly the definition. But when they add the word "callous" to my mind they are trying to say something. And as best as I could glean what they are trying to say I put my remarks on the record.

THE COURT: The definition in Devitt is in the disjunctive. Discussing an act wantonly done, if done in callous disregard to, or if done in indifference to the rights of one or more persons, including the

injured person.

MR. AURNOU: I think it has to be applied to a trademark case.

THE COURT: No. This is trademark. This is the trademark here.

It is difficult to define words that appear to be in common use. Like callous, I can say callous is like a hardening, or a callous on your foot.

(A recess is taken awaiting further communication from the jury.)

(Time noted: 3:08 p.m.)

THE COURT: Court Exhibit 7, we are ready. Which means they apparently have a verdict.

(Whereupon the jury enters the courtroom at 3:09 p.m.)

THE COURT: I have the jury's note indicating the jury arrived after a verdict.

**TESTIMONY OF JAMES J. PECK,
ON THE ISSUE OF PUNITIVE DAMAGES**

Q Is that a personal financial statement which you gave to the bank, sir?

A Yes, it is.

Q Which bank did you give it to? Did you give it to the Dutchess bank?

A I am looking for the name.

Q On the top it says submitted to Mr. Henry Ricci, assistant vice president, Dutchess bank.

A Yes, that is correct.

Q And was it submitted to the Dutchess bank in 1976 -- excuse me, 1986?

A I can't tell by this form.

Q It was at least submitted after 1985; is that not correct?

A Yes, it was.

MR. DEL GADIO: I offer it in evidence.

THE COURT: Any objection, Mr. Aurnou?

MR. AURNOU; I need to take a look at it

first, your Honor.

THE COURT: May I see it?

(Handed to the Court)

MR. AURNOU: No objection, your Honor.

THE COURT: It may be marked.

MR. DEL GADIO: This is Exhibit 44 A in evidence, I will circulate eight copies among the jury.

Q Mr. Peck, with respect to the assets listed on that financial statement, those assets are all assets that at the time that this statement was made were in your own personal name?

A May I have a copy, please?

A It would have included what PMI had.

Q But you own all the stock in PMI?

A But you own all the stock in PMI?

A My wife and I own it.

Q And where is PMI listed as an asset?

A The reason I said that is it says cash in other banks for one, accounts notes,

monies receivable, those monies would apply to the company. The other items would be mine. The real estate attached was not in my name.

Q It was in the name of corporations?

A All different corporations?

Q You own the stock in those corporations, do you not?

A My wife and I.

Q What percentage do you own?

A We owned it equally.

Q So, you owned 50 percent of the stock in each of these reels states companies?

A Yes.

Q MPG Realty?

A Yes.

Q Scotts Corners?

A Yes.

Q And Upper Hudson?

A Yes.

Q And isn't it a fact with respect to your

residence you own it in your name alone?

A The residence is in my name alone.

Q And is this statement true and correct as to the values that you assigned to these assets?

A I believe it was at that time.

Q I show you Exhibit 43, sir, and ask you if this is a financial statement you gave to the Norstar Bank of Hudson Valley NA indicating a statement of financial condition as of November 30th, 1985?

A Yes, it is.

Q And was this statement true and correct at the time that it was made by you?

A No, it wasn't.

Q It was false?

A Yes, it was.

Q In what respects was it false?

A The numbers were fabricated for a bank loan.

Q The numbers on Exhibit 44, were they

true and correct?

A The prior form you just gave me?

Q Yes.

A With the exception of what I gave you, yes.

Q Did you get the loan from Norstar Bank in connection with the fabricated financial statement?

A Yes, we did.

Q How much money did you borrow?

A I don't remember, 300 or 350 thousand.

Q By fabricated did you mean to say that you lied to Norstar Bank to obtain the loan?

A The statement is untrue, yes.

Q And did you pay back Norstar Bank the $300,000?

A Yes, we did.

Q Mr. Peck, with respect to the income that you received in 1981, 1982 and 1983, that you did not report for income tax purposes, isn't it a fact that it exceeded

$512,501?

A No, sir.

Q It did not.

I show you the document marked Exhibit 40, the waiver of indictment and felony information, and ask you if that is your signature on the first page of the waiver of information -- waiver indictment?

A Yes, it is.

Q And isn't it a fact that that felony information charges you with not reporting income for 1981 in the sum of $250,202?

A Yes.

Q And isn't it a fact that that information charges you with not reporting income in 1982 of the sum of $150,334?

A Yes.

Q And isn't it also a fact that that information charges you with not reporting income in 1983 to the sum of $103,965?

A Yes.

Q And isn't it also a fact that you pled guilty to two of the counts in that information?

A Yes.

Q The count of 1981 and for 1982?

A Yes.

MR. DEL GADIO: I offer the waiver --

THE COURT: When a party charged with income tax evasion pleads guilty he does not admit that the sum of which he is actually charged with being subject to income tax is true. All he admits when he says guilty is that a substantial tax was due the government.

So, the fact that figures are stated in the information is irrelevant to this proceeding.

MR. DEL GADIO: I offer Exhibit 40 in evidence, your Honor.

THE COURT: Are they informations?

MR. DEL GADIO: Yes.

THE COURT: Is there any objection?

MR. AURNOU: Yes.

THE COURT: Objection sustained.

Disregard the figures that Mr. Del Gadio mentioned in his questions.

Q Mr. Peck, isn't it a fact that you have a college education?

A Yes.

Q Isn't it also a fact that you have one year of law school?

A Yes.

Q The monies you received in 1981, 1982 and 1983 from the -- withdrawn.

The monies you were charged with as having received as income and not reporting, were those monies you received from gasoline station operators?

MR. AURNOU: Objection, your Honor.

THE COURT: Objection sustained.

Q Did you receive cash from gasoline

station operators --

MR. AURNOU: Same objection.

THE COURT: Objection sustained. It is a collateral matter. We are talking about Mr. Peck's present financial condition. And you will remember this when I come to the charge on assessing punitive damages.

Q Mr. Peck, at the time that you prepared the financial statement to the Dutchess Bank, did you have assets in addition to those listed?

A No.

MR. DEL GADIO: Thank you

THE COURT: Do you have any questions, Mr. Aurnou?

MR. AURNOU: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. AURNOU:

Q Mr. Peck, the financial statement which is Exhibit 44A, do you have that in front of you, sir?

A Yes.

Q And on the back there is a listing of five pieces of property in the name of three corporations plus your home.

A Yes, sir.

Q All right.

In answer to a question by Mr. Del Gadio you explained that your wife and you own 50 percent of the stock of each of those corporations. Would you like to re-think that answer and tell me if that is correct.

A I guess I wasn't very clear. I did own them. I thought you were referring to the time I made out the paper.

Q No. That's not what I am referring to at all. Did you attend a closing at the office of attorney George Calcagnini, C A L C A G N I N I, in or about 1985, at which the stock of those three corporations was purchased

A Yes, sir, I am sorry. It was October -

Q Do you recall by whom -- if you know the date, tell me.

A It was October 28, 1983.

Q 1983?

A Yes.

Q Tell me by whom it was purchased?

A PMI bought all these corporations, I am sorry.

Q And at all times since October of 1983 has PMI been the owner of those five pieces of property up to at least the middle or so of last year?

A Yes, sir.

Q All right.

Now during last year was a judgment entered against PMI in favor of another company known as the Belcher, B E L C H E R, Belcher Company of New York?

A Yes.

Q Was that in the Supreme Court, New York county?

A Yes.

Q Can you give us in rough numbers the amount of that judgment?

A I believe it was close to a million dollars.

Q And with interest does it presently exceed a million dollars.

A Yes, sir.

Q And subsequent to the entry of that judgment did the Belcher Company of New York bring any action in Orange County and in Ulster County with regard to certain of these pieces of real property?

A Yes, sir.

Q And did that action result in an order of summary judgment against PMI for closing the mortgage held, a blanket mortgage held by the Belcher Company against three of these properties?

A Yes, sir.

Q Would you tell us which properties those

were.

A Route 207 in Bivona Lane, New Windsor, Broadway and Lake, Newburgh, Wurts and McEnty, Kingston.

Q So those are the properties listed as number one under each corporation?

A Yes, sir.

Q All right.

Now I would like to turn to the item listed as number two on the Scotts Corners Builder's, Inc., which is located in Woodstock, New York.

Would you be kind enough to tell the jury whether either Scotts Corners PMI or you have any interest in that at the present time?

A Not at the present time.

Q Would you explain to the jury, was there a lawsuit between PMI and your former employer ATI?

A Yes.

Q And in settlement of that lawsuit among other things was that property deeded or transferred to ATI?

A Yes, it was.

Q And was that transfer appeared by an order of the federal prosecutor in the city of White Plains and in the Southern District of New York?

MR. DEL GADIO: Objection.

THE COURT: I will allow it.

A Yes.

Q And does either PMI or yourself or any member of your family have any interest in that Woodstock property any more?

A No.

Q And with regard to the one remaining property other than your house on this, what happened physically to the property at 626 South Road Poughkeepsie?

A It was purchased by an individual in Poughkeepsie.

Q And as a matter of fact, was only part of it purchased?

A Yes.

Q Because the street was widened and there was less of it?

A The state took part of it, yes.

Q Do you have any interest presently at 626 South Road, whatever?

A No, I don't.

Q Turning to your residence in Jeffrey Lane, when your company was starting to fail did you attempt to raise additional monies to try and save the business?

A Yes, I did.

Q Did you take out a mortgage on your home?

A Yes, I did.

Q That is not shown on this financial statement?

A No, sir, it is not.

Q From whom did you take it?

A I took it from the Long Island Savings Bank.

Q When approximately did you take it?

A I don't recall. I think it was perhaps 1986. I don't remember the closing date.

Q All right.

And since that date is that mortgage on the property as a matter of record?

A Yes.

Q And would you tell the jury the amount of the mortgage now on your home?

A $300,000.

Q And who lives in that home with you?

A My wife and I and our one daughter.

Q And, Mr. Del Gadio has had a great deal of enjoyment here and --

MR. DEL GADIO: Objection.

THE COURT: Strike that statement out.

Q Mr. Del Gadio has referred numerous

times to the fact that you entered a plea of guilty to two charges of tax evasion.

Would you just tell the jury the amount that the civil division of IRS has assessed against you to be paid by you in connection with that plea.

MR. DEL GADIO: Objection.

THE COURT: Overruled.

A As of December 31, 1988 it was between 495,000 and $500,000. To this date I haven't made any payments, so it is whatever the interest is on top of that for the last two months.

Q And do you presently anticipate being sentenced in the federal court on March 3nd of this year?

A Yes, sir.

Q And at that time in addition to all of the civil liability that you have mentioned, will you also be subjected to criminal financial penalties as provided by law?

MR. DEL GADIO: Objection.

THE COURT: Overruled.

I will allow it.

A Yes, sir.

Q And does that include a six figure dollar penalty for each year to which you pleaded guilty?

A Yes, sir.

Q Are you presently solvent, Mr. Peck?

A No, sir.

Q I am sorry?

A No, sir.

Q And does PMI have any assets whatsoever?

A No

Q And has PMI been served with a restraining order as a result of which it can't do anything any how?

A Yes.

Q And has PMI completely ceased its operations, and hasn't done anything since sometime minimal or beginning of last year?

A Yes.

Q As a matter of fact, Mr. Peck, has it been sometime since you have been able to pay your counsel fee?

MR. DEL GADIO: Objection.

THE COURT: Objection sustained.

MR. AURNOU: Nothing further your Honor.

THE COURT: Do you have anything further, Mr. Del Gadio?

MR. DEL GADIO: Yes. ...

REDIRECT EXAMINATION

BY MR. DEL GADIO:

Q ...And the business continues to run at the same location in Poughkeepsie; isn't that true?

A No, sir. PMI went out of business.

Q PMI went out of business, but the office that PMI was in is still there in Poughkeepsie, isn't it? The terminal is there?

A Dutchess terminal was only a terminal facility.

Q A terminal facility?

A Yes . ...

Q And who were the -- and the trucks that were previously owned by PMI, they are presently owned by Dutchess terminals?

A Anything that PMI owned was restrained, if that's the right word, by Belcher.

Q And what happened to the trucks?

A The last I knew they were still sitting in the yard out there. Outside of that I couldn't really tell you. I have had no contact with the leaseholders or loan holders on the equipment.

Q What have you been doing, sir, since -- well, when did you leave PMI?

A I would say it would be approximately -- we got served I think in March, and I tried to hang on for about a month or two. But with the restraining order we couldn't

do it. So it would have been in the summer of 1988.

Q And what have you been doing since then?

A Whatever I can do.

Q What do you do to make a living?

A I don't have a full time job.

Q What kind of job do you have?

A I had one service station for a while until we didn't do too well with that either.

Q You mean you were operating a service station?

A Yes.

Q And you were pumping gas?

A Yes, I was.

Q When did you sell that?

A I didn't sell it.

Q When was the last time you worked there?

A We had no money to buy the gas. It would have been around -- just prior to the holidays, right around Christmas.

Q And you were supporting yourself by operating that service station?

A No. We ate up the little bits of savings we had. We have been spending it and at this point I made a couple of loans from friends who are willing to stand behind me who are willing to help my wife, to see what happens to me.

Q How did you get here today?

A I came down with Mr. and Mrs. Aurnou.

Q Do you have a car?

A I do.

Q What kind of car do you have?

A It is in the name of one of those companies, and they came to repossess it last month and I was able to keep them away.

Q What kind of car do you have?

A A 1986 Cadillac. ...

Q What did you do with the money that you mortgaged your house for?

A It also went into the business to pay

Agway. When we got started we got behind with our supplier. And in order to make the quantum leap where we would be able to either get over the hurdle or not, I borrowed $300,000 on the house and 289,000 of it went to Agway.

Q Isnt it --

THE COURT: Would you come up to sidebar, please.

(Whereupon, at this time the following took place at the side bar.)

THE COURT: How much longer do you intend to be, Mr. Del Gadio?

MR. DEL GADIO: Two more questions.

THE COURT: This is not a proceeding to find out what happened to all the assets. The question is what he has now. So let's get this over with.

(Whereupon, at this time the following

takes place in open court.)

Q Mr. Peck, isn't it a fact that when you made the mortgage application to Long Island Savings Bank on your home, that at that time you already had liens on your home of about $300,000?

A That's what I was referring to, yes.

Q And weren't these mortgages on your home?

A No, sir. that was the Agway money I owed for product. That's what I did with the money, sir. It went from the bank to me to Agway and I had the $300,000 mortgage on my house.

MR. DEL GADIO: Nothing further, thank you.

THE COURT: Mr. Aurnou, anything further?

MR. AURNOU: Yes, briefly.

RECROSS-EXAMINATION

BY MR. AURNOU:

Q. Mr. Peck, alot of Mr. Del Gadio's questions was about history, what is your financial status at the moment, can you pay the $240,000 that this jury just found against you?

A No, sir.

Q Can you pay any punitive damages? Do you have any money?

A No, sir.

Q Do you still owe the Federal Government a half a million dollars plus interest since January 1st.

A Yes, sir.

TRIAL TRANSCRIPT 985-998, 1000-06

COURT'S CHARGE ON PUNITIVE DAMAGES

...So, in assessing punitive damages keep those three purposes in mind. The amount you assess is solely within your discretion. It should be in an amount that accomplishes the objectives I pointed out to you. It should not be in an excessive amount. It should not be in such amount that would cause financial ruin to a defendant.

You are to fix the amount of such extraordinary damages with calm discretion and sound reasoning. The amount that you award may not be determined out of sympathy or bias or prejudice or with respect to either party -- bias, sympathy or prejudice with respect to either party in this case. But you should also keep in mind that it may not be in such amount that would cause financial ruin to the defendant.

COLLOQUOY

THE COURT: It certainly makes sense. I don't know if it was any complete relevation to you, but I am inclined to believe the testimony and Mr. Peck's present situation. As I say it was a complete surprise to me.

TRIAL TRANSCRIPT, 1019

MOTION TO SET ASIDE VERDICT

MR. AURNOU: May the record reflect I move to set aside the verdict as to punitive damages with respect to James Peck.

THE COURT: Motion is denied.

MR. AURNOU: I just believe it is contrary to all the weight of the evidence.

THE COURT: The things to look for is is the ratio of punitive damages to compensatory damages. We don't have that problem here.

MR. AURNOU: I am moving on a completely different ground.

THE COURT: But they could disbelieve Mr. Peck. I told you how I felt about it. But there is a firm basis for awarding $200,000 in punitive damages.

TRIAL TRANSCRIPT, 1026

STATUTES AND AUTHORITIES

U. S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15 U. S. C. Sec. 1117 (Lanham Federal Trademark Act Sec. 35) (1975):

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff

shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award

reasonable attorney fees to the prevailing party.

Supreme Court, U.S.
FILED
FEB 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PMI PETROLEUM MARKETERS, INC., and
JAMES J. PECK,

Petitioners,

– against –

GETTY PETROLEUM CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT RULE 28.1 STATEMENT

Getty Petroleum Corp. ("Getty") is the plaintiff in the United States District Court, the appellee before the United States Court of Appeals and the respondent in this Court. There are no affiliated companies, nor subsidiary companies of Getty, except wholly owned subsidiaries.

STATEMENT OF THE CASE

Petitioners in this case, PMI Petroleum Marketers, Inc., ("PMI") and James J. Peck, seek a writ of certiorari, for this Court to review the unanimous decision of the United States Court of Appeals for the Second Circuit, dated October 16, 1989. The decision affirmed a jury verdict rendered in the United States District Court for the Eastern District of New York, Mishler, J., assessing compensatory damages for acts of trademark infringement and unfair competition in the sum of $239,997.40 and punitive damages, against James J. Peck, alone, in the sum of $200,000. Getty's complaint alleged the following counts: (Count I) unfair competition in the form of trademark infringement; (Count II) Unfair competition by means

of false designation of origin, false description and false representation; (Count III) pendant New York State claims for unfair competition; (Count IV) dilution of trademark values; and (Count V) false advertisement.

The acts giving rise to the action were the unauthorized sale and delivery of non-Getty gasoline by PMI and Peck to three Getty brand gasoline stations located in Westchester County, New York: the Peekskill, Ossinging and Mohegan Lake stations. While Getty claimed infringement at a fourth station, the Poughkeepsie station, the jury refused to award damages for that station and plaintiff did not appeal the jury's verdict.

The District Court ordered a bifurcated trial in this action.

First, the Court heard issues of liability and the amount of compensatory damages. At the second trial the jury determined the amount of punitive damages to be awarded.

During the first trial the jury rendered a special verdict on the following factual issues: (1) whether the operators of the stations infringed the Getty trademark by selling non-Getty gasoline as Getty gasoline; (2) whether PMI was a contributory infringer; (3) whether Peck was a contributory infringer; (4) the amount of Getty's lost profits resulting from PMI or Peck's infringement; and (5) whether the acts of PMI or Peck, as contributory infringers were done knowingly, intentionally and with callous disregard for Getty's trademark rights. The jury returned a

verdict in the affirmative with respect to the Peekskill, Ossining and Mohegan Lake stations.

The jury found that the operators of the gasoline stations infringed Getty's trademark by selling non-Getty gasoline as Getty gasoline and that PMI and Peck were contributory infringers. Moreover, the jury found the acts of Peck and PMI as contributory infringers were done "knowingly, intentionally and with a callous disregard for Getty's trademark rights."

Compensatory damages were awarded to Getty in the following amounts with respect to each of the three stations:

Peekskill Station	- $150,003.00
Ossining Station	- $ 44,997.20
Mohegan Lake Station	- $ 44,997.20.

Following the jury's verdict on the first part of plaintiff's case, the second trial ensued consisting of the testimony of James J. Peck and documentary evidence of Peck's financial condition. The jury returned a special verdict awarding $200,000 in punitive damages against Peck and none against PMI.

The Court entered judgment on February 17, 1989 upon both jury verdicts.

While PMI and Peck originally appealed from the entire judgment, their brief filed with the United States Court of Appeals limited the appeal to: (1) the sufficiency of the evidence in support of the jury's verdict on compensatory damages against PMI and Peck; and (2) the size of the punitive damage award against

Peck and whether the award violated Peck's "due process" rights. PMI and Peck argued, unsuccessfully, that the evidence of their infringement did not demonstrate, with the sufficient degree of certainty, the exact amount of unauthorized deliveries PMI and Peck made to the three Getty stations where they concede they sold gasoline. As to punitive damages, Peck argued that the jury erred: (1) by failing to believe his undocumented and self-serving claims of insolvency; (2) by treating himself differently from his corporation, PMI, which Peck throughout the trial attempted to blame as the responsible party; and (3) that the award violated the due process clause of the 14th Amendment of the United States Constitution.

The Court of Appeals found each of PMI and Peck's arguments without merit. The court found that ample evidence existed to support plaintiff's theory of damages, "including meter readings and photographs of surreptitious deliveries of gasoline." (A-40, petition). The court noted that the defendants refused to present an alternative calculation of damages. Accordingly, the Court found that plaintiff needed only to prove, "some basis for a reasoned conclusion as to the extent of the injury." (Id.)

The Court of Appeals dismissed Peck's argument that the punitive award was excessive, observing that the jury did not believe Peck's claim of insolvency and that the burden of showing modest means fell on him. Furthermore, the Court of Appeals

found that the jury assessed a lesser sum in punitive damages than in compensatory damages.

The Court of Appeals dismissed other arguments advanced by Peck and PMI as "without merit."

Essentially, all the identical arguments which the petitioners raised and lost on below, they now ask this Court to consider as grounds for granting a writ of certiorari. However, no serious issue is raised by petitioners, warranting review by this Court. Petitioners do not set forth an important question of Federal Law.

In this respect the respondent defers to the Second Circuit itself and its ability to isolate important questions of law from insignificant or frivolous issues. The Second Circuit found the "legal issues" raised by the

defendants meritless and viewed the appeal as essentially a challenge to the sufficiency of the evidence before it and the reasonableness of the punitive damage award.

The petitioners' challenge to the compensatory damages is a challenge to the sufficiency of the evidence - the same one raised by the defendants in motions to dismiss after the plaintiff's case in the first trial and after the close of evidence in the first trial. The District Court found adequate evidence to support plaintiff's claims of liability and damages, particularly in light of evidence that the defendants "destroyed or failed to produce delivery tickets." Peck and PMI, on appeal, again challenged the sufficiency of the evidence supporting the compensatory damage

award and a unanimous Circuit Court found the evidence sufficient. It is, therefore, respectfully submitted that a third review of the record by this Court is both unnecessary, given the ample scrutiny the facts in this case have already received, and inappropriate given the gravity and importance of the many cases this Court is called upon to decide.[1]

---

[1]Unfortunately, the petitioners have not fairly and accurately presented the evidence upon which the jury's verdict and the affirmance by the Second Circuit depended. Rather, they rely in their petition upon snippets, taken out of context, from the more than 1,000 pages which constituted the joint appendix in this action. While perhaps the best way to remedy this imbalance would be to present the entire record to this Court, the respondent believes that at this point to do so would place an unfair burden both on this Court and on the respondent. Respondent hopes

(Footnote Continued)

Equally unpersuasive is petitioners' claim that this Court should review the award of punitive damages. The "due process" and "equal protection" claims that PMI and Peck wish to advance were not properly preserved for appeal, as the defendants did not object on any of those grounds to the jury charge on punitive damages. The petitioners only raised the argument as an afterthought in light of this Court's decision in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909

(Footnote Continued)
that the discussion of the case that follows in the argument will provide this Court with a picture of both the character and quality of the proof offered by Getty at trial and the many obstacles that PMI and Peck placed in the way of ever fully demonstrating the scope of defendants' infringement of the Getty trademark.

(1989). On the merits the punitive damage award was reasonable and the process afforded the defendants fair. The amount awarded was less than the compensatory damages. While James Peck claimed insolvency, the jury did not believe his claim, but rather believed that his net worth statement, admitted as Exhibit 44 in evidence, accurately showed his net worth at $1,478,000. While the jury may well have believed that PMI was no longer in business and thus chose not to perform the futile act of awarding punitive damages against it, the same is not true for Peck. The evidence at trial demonstrated that a corporation using the name Dutchess Terminals operated all the facilities which were

once PMI's and employed most of the same workers. A reasonable basis existed for awarding punitive damages against Peck, but not against PMI. Finally, the defendants received both procedural and substantive due process, including the special safeguards afforded by a bifurcated trial.

SUMMARY OF ARGUMENT

A. COMPENSATORY DAMAGES

1. The petitioners ask this Court to review the sufficiency of the evidence presented in support of the compensatory damages awarded for trademark infringement. The facts in this case have already been found by the jury, sustained by the District Court judge as sufficient and these findings were reviewed by the Court of Appeals for the Second Circuit and unanimously affirmed. A third

determination of the sufficiency of the evidence, by this Court, is both unnecessary and contrary to the purpose of Supreme Court review.

2. In Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931) and Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1945), this Court set forth the rule that where injury is proven, but the nature of the wrongdoing precludes proof of damages with certainty, all a plaintiff must give is some basis for a reasoned conclusion as to the extent of the injury. In this case the defendants infringed upon Getty's trademark by delivering their own gasoline to non-Getty brand stations under cover of night and attempted to hide the scope of their infringement through, among other means, destroying

or not producing documents. The Second Circuit correctly applies Story Parchment and Bigelow in such cases and allows a recovery where a reasonable basis for the award exists. The District Court and Court of Appeals correctly concluded that such a basis existed in this case. The petitioners' challenge to this conclusion raises no substantial questions of Federal Law, but voices a mere disagreement with the application of the law to the facts. No substantial federal question is raised by this challenge.

B. PUNITIVE DAMAGES

1. The punitive damages in this case were not excessive. They were less than the compensatory damages and less, in fact, than the treble damages which would have been awarded had

Getty pursued that remedy pursuant to §35 of the Lanham Act, [15 U.S.C. §1117]. There is no reason why this Court should re-decide the factual issue of James Peck's ability to pay by granting a writ of certiorari.

2. Peck's claim that the jury's disparate treatment of him from PMI violated the equal protection clause of the United States Constitution is insubstantial. The evidence demonstrated that Peck, alone, possessed the financial resources to pay a punitive damage award and that the only effective punishment would be one aimed the responsible individual and not his now defunct corporation. The jury had a reasonable basis for treating Peck differently from PMI, even were there any merit to the unsupported conclusion that the equal

protection clause of the United States Constitution constitutes a check on a jury's power to award punitive damages in a civil lawsuit.

3. The petitioners' claim that the punitive damage award violated the due process clause of the 14th Amendment of the United States Constitution, in this case, does not raise a significant federal question and is untimely. The petitioners only raised the issue for the first time before the Second Circuit, in the light of what it considered an invitation to do so from this Court's decision in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989). In fact, James Peck received both procedural and substantive due process. The award was reasonable and not a consequence of

passion or prejudice. Moreover, it resulted from a second trial, after a finding of intentional infringement, held solely on the issue of the proper amount of punitive damages, if any, to be awarded.

ARGUMENT

POINT I

THE COMPENSATORY DAMAGES SHOULD NOT BE REVIEWED ON WRIT OF CERTIORARI

A. THE UNITED STATES SUPREME COURT SHOULD NOT BE ASKED TO CONDUCT A *DE NOVO* REVIEW OF THE FACTS FOUND BY THE JURY AND SUSTAINED ON APPEAL

The appeal by PMI and Peck of the compensatory damage award is an attempt to have yet a third court review and decide facts already determined by the jury. The jury itself already weighed the facts and the Court of Appeals determined that the evidence supported the jury's

conclusions. The Second Circuit's decision in this respect should be the final word.

While this Court is, of course, empowered to review the record in any case before it, it will not re-evaluate the evidence so long as the facts found by the jury find some support in the record. As this Court stated in Roemer v. Maryland Public Works Board, 426 U.S. 736, 758 (1976):

> We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to reappraise the evidence, unless it plainly

> fails to support the findings of the trier of facts. That is certainly not the case herein, and it would make no difference even if we were to second-guess the District Court in certain particulars.

For a similar statement of this Court's policy see, also, General Motors Corp. v. Washington, 377 U.S. 436, 441-2 (1964), "'of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean we will reexamine as a court of first instance, findings of fact supported by substantial evidence.'" (Citation omitted).

The evidence in support of plaintiff's verdict was substantial and justified the jury's well-reasoned

and particular findings of damage at three of the four stations where Getty claimed the petitioners acted as contributory infringers of Getty's trademark. While, as in each instance in which a question of fact is presented to a jury for resolution, other theories exist, in this case the jury concluded that the defendants' version of the case was unlikely and that plaintiff proved both an injury and a reasonable basis for imposing damages for the injury defendants caused. The jury's findings were unanimously sustained by the Second Circuit. The petitioners' invitation that this Court step in and make findings of fact different from those sustained below should be denied.

B. PETITIONERS RAISE NO SIGNIFICANT CHALLENGE TO THE RULE THAT GETTY REQUIRED ONLY A REASONABLE BASIS TO RECOVER ITS LOST PROFITS AT THE PEEKSKILL, OSSINING AND MOHEGAN LAKE STATIONS

The United States Supreme Court in the landmark cases of Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931), and Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1945), set forth the governing rule that where an injury is proven, the inability to prove the extent of the injury with certainty must be no hindrance to the injured party's right to recover adequate compensation. The petitioners do not challenge this rule, but claim that this case should be an exception. No grounds were presented which warrant a reconsideration of Story Parchment or Bigelow.

While Story Parchment Co. v. Patterson, supra, involved a claim brought under the Sherman Antitrust Act for price fixing, the principle set forth in that landmark case is applicable to the unfair competition claims brought by Getty against Peck and PMI. The Supreme Court noted, in refusing to characterize the jury's award as speculative:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. . . . The wrongdoer is not entitled to complain that they [damages] cannot be measured with the exactness and precision which would be possible if the case, which he alone is responsible for making, were otherwise.

Id. at 563. In Story Parchment, the Court upheld plaintiff's proof of profits which would have been realized in the absence of a price fixing conspiracy.

The Second Circuit decisions, Deering, Milliken & Co., Inc. v. Gilbert, 269 F.2d 191, 193 (2d Cir. 1959) and Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983), cited by the Court of Appeals in upholding the jury's verdict, are fitting and proper applications of the principles set forth in Story Parchment, and Bigelow. In Brink's, Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983), the court upheld the City of New York's recovery of both punitive and compensatory damages resulting from the theft by Brink's employees, of parking meter revenues which

they were contractually obligated to collect for the City. The court noted evidence of a systematic theft over a long period of time and dismissed as speculative Brink's argument that other factors might have accounted for the deficit.

In Deering, Milliken & Co. v. Gilbert, supra, the court allowed plaintiff to estimate its damages resulting from a, "criminal scheme calculated to trade upon the Milliken trademark," id. at 192, by inferring sales from the 67,600 counterfeit hand tags delivered to the defendant bearing the Milliken mark. The court described Gilbert's defense as follows:

> Upon pre-trial examination Gilbert exercised his privilege against self-incrimination. At the trial he denied all sales of

> Milium but even after the judge stated that his testimony was "not worthy of belief," instead of producing records to show what it was he had sold, he produced no records at all. His position then, as it has been throughout these proceedings, was one of "sitting tight" and demanding that Deering, Milliken prove the damages sustained by it as a result of his infringing sales. Faced with the task of proving the scope of Gilbert's shady operation, Deering Milliken was forced to use indirect and circumstantial evidence.

Id. at 193. The court found that plaintiff could infer lost sales from the number of counterfeit hand tags missing at the defendant's premises at the time they were seized by search warrant. The court, further, held that such a showing shifted the burden of refuting plaintiff's evidence upon the defendant, either by proving the actual sales or by showing an absence

of sales. The court set forth the rule that, "[w]here, as here, the defendant controls the most satisfactory evidence of sales, the plaintiff need only establish a basis for a reasoned conclusion as to the extent of injury caused by the deliberate and wrongful infringement." Id. at 193.[2]

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[2]Nor is the holding in Deering Milliken, in any sense inconsistent with the Ninth Circuit's decision in Playboy Enterprises v. Backrack Clothing Co., Inc., 692 F.2d 1272 (9th Cir. 1982), as the petitioners suggest. In Backrack Clothing Co., Inc., the trial judge, sitting without a jury, held an equitable accounting for defendant's profits. While the Ninth Circuit refused "to engage in appellate fact finding," and on this limited ground did not reverse the District Court's finding that Playboy could not recover all of the defendant's profits based upon a showing that 43,000 counterfeit Playboy and Rabbit Head labels were manufactured, it is precisely "appellate fact finding," that the

(Footnote Continued)

It is clear, based upon the principles of the foregoing cases, that Getty's verdict should be upheld as plaintiff showed both substantial injury to its trademark and a reasoned conclusion as to the extent of the injury. The defendants simply rested after the plaintiff's case. They offered no evidence of their own to refute the damages claimed.

Plaintiff demonstrated an extensive injury inflicted by PMI and Peck. By virtue of an anonymous tip, documents were uncovered and authenticated showing deliveries to the Peekskill

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(Footnote Continued)
petitioners asked both the Court of Appeals and now ask this Court to engage in by requiring a rule which would limit plaintiff's damages to the few specific deliveries the defendants were forced to admit by uncontrovertable evidence.

station on March 23, 1986, May 15, 1986 and May 14, 1986; to the Ossining station on May 15, 1986, as well as on two other occasions without date; and to the Mohegan Lake station on May 1, 1986. Plaintiff proved two other deliveries to the Ossining station, on September 5, 1986 and September 12, 1986, even after PMI and Peck received a cease and desist letter warning them to discontinue their illegal activity.

While Peck and his employees, naturally, denied any other deliveries except those uncovered by surveillance, additional proof came from a temporary employee, Robin Berger, a college student who worked from June 1986 to the end of August, 1986, during Brenda Binney's maternity leave. She remembered dealing with Shams Ul Haque, the dealer of the

Ossining and Mohegan Lake stations, who would place orders both personally and by phone. She also remembered the Peekskill station appearing on the delivery sheets and in the files. Finally, she remembered a specific midnight delivery scheduled for a station identified as Getty, at least once during her employment with PMI. Octane tests of the gasoline, taken at all three stations, in September of 1986, further demonstrated the sale of non-Getty gasoline. Because opening and closing meter readings were available for the Peekskill station, plaintiff utilized the meter readings to quantify sales of non-Getty gasoline at that location at 877,007 gallons of unleaded gasoline and 306,333 gallons of unleaded premium gasoline. Taken together, this

constituted substantial evidence that Peck and his company, PMI, many of whose employees formerly worked for Power Test, inflicted substantial injury upon Getty in the form of sales diverted from Getty at the Peekskill, Ossining and Mohegan Lake stations.

Plaintiff provided a reasonable basis for its calculation of lost sales for all three locations, including an exact quantification of the loss for the Peekskill location. At Peekskill, the difference between metered sales at the station and Getty's actual delivery records demonstrated Peck and PMI's infringement. While the defendants challenged this estimate based upon minor discrepancies between stick readings and meter readings, as well as the general assertion that the non-Getty gasoline

may have come from other sources, neither objection has weight. The jury considered and believed that the meter readings, which Herbert Wechsler testified are more accurate than stick readings demonstrated the actual sales for the Peekskill station. The jury was entitled to and did disbelieve defendants' attempts to impeach these readings. Nor was the inference that the non-Getty sales came from Peck and PMI remote. Defendants offered no proof that others were involved in the same nefarious pursuits as the defendants. The evidence at trial demonstrated only that PMI and Peck unlawfully infringed on the Getty trademark at the Peekskill station and the surrounding area. The defendants, in fact, are the ones that ask this Court to speculate by ascribing causes to

plaintiff's injury other than the one demonstrated, Peck and PMI, with no evidence as to the existence of any alternate causal agent.

Similarly, the estimates at the Ossining and Mohegan Lake stations were entirely reasonable under the circumstances. Both stations conducted business in the same geographical area as Peekskill and documentary evidence existed demonstrating deliveries of non-Getty gasoline at both stations over an extended period of time. For Ossining, those deliveries occurred, among other times, on May 15, 1986, September 5, 1986 and September 12, 1986. Additionally, notes exist which show other deliveries at unspecified dates and times. Moreover, Robin Berger testified that the dealer of the Ossining and Mohegan

Lake station purchased gasoline from PMI and Peck throughout the summer of 1986. At the Mohegan Lake station one delivery ticket for May 1, 1986 delivery was produced. An octane rating of less than what Getty sells as its gasoline existed at both locations in September, 1986. Getty asked the jury to estimate the damage inflicted by Peck and PMI, at Ossining and Mohegan Lake based upon evidence that they were actively engaged in the infringement of Getty's trademark at these stations and in the surrounding area. The jury returned a verdict with modest awards in the sum of $44,997.20 for each station, the equivalent of the profits from slightly less than 2 truckloads of Getty unleaded regular gasoline per month, for the period

from February 1, 1985 through September 22, 1986.

The real extent of the damage to the Getty trademark will never be known. Substantial evidence of the destruction or concealment of documents in this case proved conclusively to the jury that James Peck and PMI had plenty to hide. Despite their statement in the petition for writ of certiorari, that "petitioners produced nearly one thousand documents to disprove Getty's claims," (Petition, p. 40), they do not disclose the fact that the only documents they produced occurred after lengthy motion practice to compel, which motions themselves arose only after plaintiff proved the existence of the documents through Peck's secretary Brenda Binney. The production of these documents at trial

occurred by way of a subpoena which survived a motion to quash. Plaintiff demonstrated through Exhibit 72V in evidence, that in no calendar month did the invoices ("pink slips") produced by Peck represent even one - half of the monthly deliveries made by Peck and PMI. Other missing documents included loading tickets, delivery tickets, and ledgers. Were loading tickets produced they would have shown the destination of the gasoline delivered by Peck and PMI. The jury chose not to believe that Peck's secretary knew more about the operation of the company than Peck. Rather, the jury found that James Peck lied about his involvement in the company, actively infringed the Getty trademark and concealed documents

which, if produced, would show Mr. Peck's true colors.

This case demonstrates that the principles of Bigelow and Story Parchment are correctly applied by the Circuit Court of Appeals and that no reason exists for this Court to reevaluate or make any alterations to the principle that a party may not benefit from its own wrongdoing in avoiding damages. Getty demonstrated a more than reasonable basis for the jury's award.

POINT II

PETITIONERS CHALLENGE TO THE PUNITIVE DAMAGE AWARD AGAINST PECK DOES NOT MERIT THIS COURT'S REVIEW

In challenging the punitive damage award against Peck, in the sum of $200,000, defendants raised three grounds: (1) $200,000 was excessive

in light of Peck's self-serving claims of insolvency; (2) the jury acted unfairly by awarding punitive damages against Peck, but not the corporation, PMI, which was created by Peck as a shield; and (3) the award violates due process under the Fourteenth Amendment of the United States Constitution.

These arguments lack merit. The jury decided the question of Peck's ability to pay a punitive award against him in a separate proceeding held after the jury determined that Peck acted intentionally, willfully and with a callous disregard of plaintiff's trademark rights. The jury, justly, concluded that an award of punitive damages against Peck and not against PMI, the now defunct corporation that Peck utilized to sell gasoline to Getty gasoline stations

best serves the purposes of deterrence and punishment. Finally, defendants neither preserved nor demonstrated their amorphous due process claim, which appears to be a repetition of their assertion that Peck cannot afford to pay such a judgment and the notion that the court should have charged utilizing a standard of recklessness. Plaintiff in this case proved much more than recklessness, plaintiff proved that Peck intentionally, knowingly and callously infringed plaintiff's trademark rights.

A. PUNITIVE DAMAGES AWARDED AGAINST JAMES PECK WERE REASONABLE IN AMOUNT

Defendants claim that the amount of damages awarded exceed Peck's ability to pay is not a legal challenge and raises no federal question warranting this Court's review. The

jury found otherwise after a separate proceeding limited precisely to James Peck's ability to pay. At that proceeding, Mr. Peck's financial statement for 1986 was admitted into evidence. This statement showed a net worth of $1,478,000 including, inter alia, his interest in the going concern, then PMI, a company with $10,000,000 in revenues in 1986. The jury concluded that the financial statement of 1986 reflected the present wealth of James Peck.

Peck produced no evidence to document his claims of insolvency. His hard luck claim that he is now pumping gas and that his business, PMI, fails to exist is refuted by the fact that the same personnel, minus Manzi, operate PMI's assets as a going concern under a new corporate entity,

"Dutchess Terminals". Brenda Binney, Betty Modesto and Vasoughi "Russo" still "run" the company. The jury, appropriately concluded that Mr. Peck did not merely transfer Dutchess Terminals to Russo for no consideration, but rather is distancing himself from his source of income to color his present facade.

It is worth pointing out that had plaintiff pursued its remedy of treble damages pursuant to § 35 of the Lanham Act, [15 U.S.C. § 1117], a compensatory remedy, then plaintiff would have recovered an additional $479,994.80 above the compensatory damages actually awarded, an amount exceeding the punitive award by $279,994.80.

B. THE JURY CORRECTLY IMPOSED A PUNITIVE AWARD ON JAMES PECK AND NOT PMI

Defendants provide no authority for their assertion that the absence of a punitive award against PMI warrants vacating the award against Peck. Even less do they produce any authority for the proposition that these findings constituted a denial of equal protection. The jury's determination can no more be construed as governmental action, bringing this case under the equal protection clause, than a punishment by the state, an argument rejected by the Supreme Court in Browning-Ferris Industries of Vermont v. Kelco, 109 S. Ct. 2909 (1989). Moreover, the jury's decision to award punitive damages against Peck, rather than PMI, was reasonable.

In this respect, it ironic that the petitioners rely upon the Second Circuit decision in Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363 (2d Cir. 1988). In that case the Circuit upheld a punitive recovery against defendant Solerwitz in the sum of $500,000, even while vacating and remanding an award in the like sum against Solerwitz's corporation, the defendant Lightning Bolt. The jury in this case did what the Second Circuit said it should have done in Smith v. Lightning Bolt Productions, Inc. The evidence before the jury demonstrated that James Peck left his corporation, PMI, as a shell with no assets to satisfy a judgment. Accordingly, the jury correctly concluded that a punitive award would only be meaningful against Peck and not PMI.[3]

Furthermore, it certainly fell within the jury's discretion to award punitive damages against Peck, whom the jury found to be the living embodiment of the wrongful acts of the trademark infringement committed by PMI. While Peck, throughout the trial, attempted to avoid being associated with the corporation he created, the jury did not believe that either Michael Manzi or Peck's secretary, Brenda Binney, ran PMI. Rather the jury believed that Peck alone ran it. Peck's ruse fooled none of the jurors and they said so by pointing their fingers at James Peck.

C. THE DEFENDANTS MAY NOT CLAIM A VIOLATION OF DUE PROCESS IN THIS CASE

Petitioners raised the claim that plaintiff is not entitled to recover punitive damages against Peck, as it

violates Peck's due process rights under the Fourteenth Amendment, for the first time before the Second Circuit. This argument is both untimely and incorrect.

It is untimely because the defendants never raised the issue at the district court, either by objecting to the jury charge on punitive damages or by motion for judgment, N.O.V. Accordingly, the challenge is untimely, pursuant to Fed. R. Civ. P. 51 and may not now be challenged due to a subsequent Supreme Court decision leaving the issue, arguably, open. Browning-Ferris Industries of Vermont v. Kelco, 109 S. Ct. 2909 (1989). In fact, the United States Supreme Court in Browning-Ferris, refused to decide the due process challenge on the grounds that the appellant failed to

raise the issue in any of the lower courts.

However, the defendants in this case received both substantive and procedural due process. Ample evidence existed that Peck possessed the financial ability to pay the punitive award and no showing was made that the award resulted from passion or prejudice. As this Court stated in Smith v. Lightning Bolt Productions, Inc., supra, "the incompleteness of the record as to Solerwitz's net worth is not a basis for reducing the punitive damage award against him, for it is the defendant's burden to show that his financial circumstances warrant a limitation of the award." Id. at 373.

Nor is there any merit to the argument that the court should have included recklessness as part of its

definition of callous disregard in the jury charge. The court set a far higher standard than recklessness in its charge to the jury, requiring the plaintiff to prove that the infringement was done "intentionally, knowingly and with a callous disregard of plaintiff's trademark rights." By contrast, in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), plaintiff sought to recover punitive damages in an action against a drug manufacturer for negligent distribution of a defective product. As no intentional violation occurred, the court merely considered what level of recklessness must be shown in order to recover punitive damages under New York law. Certainly, Peck did not suffer a violation of due process where plaintiff's

burden was to prove an intentional violation of its trademark rights.

Finally, the trial court afforded the defendants a complete hearing, separate from the main trial, on the question of the appropriate amount to be imposed as punitive damages. The Second Circuit approved such an approach in Brink's, Inc. v. City of New York, supra, 717 F.2d at 707, even while finding that it did not constitute an abuse of discretion to refuse bifurcation in Getty Petroleum Corp. v. Island Transportation Corp., 862 F.2d 10 (2d Cir. 1988) cert. denied, 109 S. Ct. 1642 (1989). In light of the procedural safeguards afforded this defendant, one is hard pressed to understand in what fashion he received less than due process of law.

CONCLUSION

For all of the above reasons, this Court should refuse to issue a writ of certiorari, as demanded in the petition.

Dated: Garden City, New York
February 12, 1990

Respectfully submitted,

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